

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN D. CERQUEIRA,

Plaintiff,

v.

AMERICAN AIRLINES, INC.,

Defendant.

CIVIL ACTION NO.: 05-11652 WGY

**DEFENDANT'S AMENDED MOTION IN LIMINE TO EXCLUDE DEPOSITION
TESTIMONY OF BARRY BLUMENTHAL AND RICHARD FAULK**

Defendant American Airlines, Inc. ("AA") moves in limine to exclude portions of the deposition testimony of plaintiff's treating physician, Barry Blumenthal ("Blumenthal"), and plaintiff's treating psychiatrist, Richard Faulk ("Faulk") because it exceeds that which is reflected in their treatment notes. Neither has been disclosed as an expert witness and neither has proffered expert disclosures in accordance with Fed.R.Civ.P. 26(b)(2). Therefore, such opinion testimony should be excluded. *See, e.g., Gonzalez v. Executive Airlines, Inc.*, 236 F.R.D. 73, 78 (D.Puerto Rico 2006); *Garcia v. City of Springfield Police Department*, 230 F.R.D. 247, 249-50 (D.Mass. 2005). *See also* Fed.R.Civ.P. 26(b)(2).

Blumenthal testified at deposition that he diagnosed plaintiff with post-traumatic stress disorder, and that there is a recognized treatment methodology for post-traumatic stress disorder. (Deposition of Barry Blumenthal, hereinafter "Blumenthal Deposition," attached hereto as Exhibit 1, pp. 7, 18-19, 21). Blumenthal further testified, however, that he is not a licensed psychiatrist or psychologist and that he would validate the conclusions of a psychiatrist or psychologist over his own on such issues. (Blumenthal Deposition, p. 34-35). Blumenthal also

testified that he treated plaintiff primarily for physical ailments, though he provided him with a psychiatric referral. (Blumenthal Deposition 7:1-8, 16:3-25, 23:4-20).

At deposition, Faulk was asked to describe his experiences in treating patients with post-traumatic stress and anxiety disorders (Deposition of Richard Faulk, hereinafter "Faulk Deposition," attached hereto as Exhibit 2, pp. 9-11). This series of questions addressed neither his treatment of nor observations regarding plaintiff and should be excluded. Similarly, Faulk was asked to opine regarding whether anxiety disorder comes with physical symptomology. Again, this question and the response thereto have no bearing on Faulk's treatment of or observations regarding plaintiff. (Faulk Deposition p. 21). Faulk was further asked if it was "unusual" for a patient to wait a year before seeking treatment for a psychological condition. This too is not related to Faulk's treatment of or observations regarding plaintiff. (Faulk Deposition p. 23).

Because the testimony described above fails to fall within the treating physician exception to the expert disclosure rules, the deposition testimony of Blumenthal and Faulk described above should be excluded at trial.

Respectfully submitted,

Dated: November 29, 2006

AMERICAN AIRLINES, INC.

By its Attorneys,

/s/ Amy Cashore Mariani

Michael A. Fitzhugh, (BBO 169700)

Amy Cashore Mariani, (BBO #630160)

FITZHUGH, PARKER & ALVARO LLP

155 Federal Street, Suite 1700

Boston, MA 02110-1727

(617) 695-2330

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on November 29, 2006.

/s/ Amy Cashore Mariani
Amy Cashore Mariani

CERTIFICATE OF CONFERENCE

I hereby certify that counsel have conferred regarding the confidentiality of the exhibits attached hereto, and that Plaintiff's counsel, David Godkin, assents to the filing of, but not the substance of, this amended motion in limine, and also assents to the electronic filing of the exhibits attached hereto.

/s/ Amy Cashore Mariani
Amy Cashore Mariani

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
3 Civil Action No.: 05-11652-WGY
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9 JOHN D. CERQUEIRA,
10 Plaintiff,
11 vs.
12 AMERICAN AIRLINES, INC.
13 Defendant.
14 _____/

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16 VIDEOTAPED DEPOSITION OF BARRY BLUMENTHAL, DO
17 A WITNESS
18 TAKEN BY
19 THE PLAINTIFF

20 DATE: WEDNESDAY, JULY 26, 2006
21 TIME: 9:00 A.M. - 9:38 A.M.
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1 Q. And you have been Mr. Cerquiera's primary care
2 physician since January of 2004, is that right?

3 A. I'd like to refer to the record, if I may.
4 Our first meeting was on 1/2/04.

5 Q. And the file that you have in front of you, is
6 that your -- your medical records concerning your
7 treatment of Mr. Cerqueira?

8 A. Yes, it is.

9 Q. And in approximately January 15th of 2004, you
10 diagnosed Mr. Cerqueira as suffering from post-traumatic
11 stress disorder or PTSD, is that correct?

12 MS. MARIANI: Objection.

13 THE WITNESS: Yes. That's correct.

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2 BY MR. GODKIN:

3 Q. And what did you do with Mr. Cerqueira on
4 January 15th that led you to give him this diagnosis?

5 MS. MARIANI: Objection.

6 THE WITNESS: Mr. Cerqueira presented with
7 some other complaints, other physical complaints
8 that we took care of, and if my memory serves me
9 correct, it was after we finished dealing with his
10 physical problems, he had taken me aside and told
11 me about an event that had occurred sometime in the
12 recent past where he was put off an airplane.

13 MS. MARIANI: Move to strike.

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1 MS. MARIANI: Move to strike.

2 BY MR. GODKIN:

3 Q. Did you devise a -- a treatment plan for
4 Mr. Cerqueira as a result of your diagnosis?

5 MS. MARIANI: Objection.

6 THE WITNESS: As -- My role as a family
7 physician, I can deal with psychiatric disorders,
8 but at the current time, prefer to have
9 consultation prior to initiating treatment, to make
10 sure that the diagnosis is accurate and correct.

11 MS. MARIANI: Move to strike.

12 BY MR. GODKIN:

13 Q. And when you say a consultation, what -- What
14 do you mean?

15 A. Would be within appropriate subspecial --
16 subspecialist who I would feel would be more experienced
17 and better qualified to assign a diagnosis to a patient
18 other than myself.

19 Q. And what type of subspecialist are you
20 referring to?

21 A. This -- In this case, it would either be a
22 psychiatrist or psychologist.

23 Q. Did you take any steps to refer Mr. Cerqueira
24 to a psychiatrist or a psychologist?

25 A. Yes, we wrote him a referral for -- I -- If I

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1 Q. Is there -- In your knowledge and experience,
2 Dr. Blumenthal, is there a recognized course of
3 treatment for post-traumatic stress disorder?

4 MS. MARIANI: Objection.

5 THE WITNESS: Yes.

6 BY MR. GODKIN:

7 Q. What is it?

8 A. It would depend on the severity. It could be
9 anything from counseling to counseling with medication,
10 to medication --

11 MS. MARIANI: Move to strike.

12 A. (Continuing) -- only.

13 BY MR. GODKIN:

14 Q. Is post-traumatic stress disorder a -- a
15 curable condition?

16 MS. MARIANI: Objection.

17 THE WITNESS: I don't know that anything is
18 curable. I know that it's treatable.

19 MS. MARIANI: Move to strike.

20 BY MR. GODKIN:

21 Q. Based on your experience as a physician for
22 many years, do you have any view on how post-traumatic
23 stress disorder can affect a patient's daily life?

24 MS. MARIANI: Objection.

25 THE WITNESS: Yes, I do.

CONFIDENTIAL

1 BY MR. GODKIN:

2 Q. What is your view on that?

3 MS. MARIANI: Objection.

4 THE WITNESS: That can run the gamut from loss
5 of simple ability to do simple things to putting
6 somebody in bed and afraid to -- to come out in the
7 world.

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Q. Did you have any further discussion with him about any symptoms that he was suffering, at the date of that visit?

A. The discussion regarding his post-traumatic stress disorder was kept to a limit because I had felt that since I had been subpoenaed for deposition, that it would be inappropriate to talk about it any further, and I treated him for his chief complaint that day.

MS. MARIANI: Move to strike.

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2 **REDACTED**
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4 Q. And is it fair to say, Doctor, that the
5 records contained in Exhibit 4, demonstrate that he did
6 not mention to you on January 2nd, 2004, complaints
7 relating to an incident occurring on an American
8 Airlines flight in December of 2003?

9 A. That's correct.

10 Q. And is it fair to say, Doctor, that you
11 treated him at that time for cold symptoms, including
12 shortness of breath?

13 A. Correct.

14 Q. During the course of your normal examination,
15 Doctor, do you inquire as to psychiatric or
16 psychological issues that a patient might be having?

17 A. Unless a patient complains of something
18 specifically neurological or psychiatrically, besides
19 good morning, how are you, how're you doing, the answer
20 would be no.

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18 Q. Sir, what is your understanding of the
19 diagnostic criteria under the DSM-IV for post-traumatic
20 stress disorder?

21 A. I'm not sure I understand your question.

22 Q. Are you familiar with the diagnostic criteria
23 contained in the DSM-IV for post-traumatic stress
24 disorder?

25 A. Yes, I am.

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1 Q. And what is your understanding of his
2 diagnostic criteria?

3 A. The diagnostic criteria, it -- It has to fit
4 many different categories as far as the abilities to do
5 activities of daily living, the ability to function in
6 normal relationships, the ability not to have -- The
7 ability to possibly have flashbacks and put yourself in
8 a similar situation, panic disorder, according --
9 Anything that paralyzes you from living, what we would
10 call a normal life, which may also include profound
11 depression.

12 Q. Do you have any understanding as to whether or
13 not a life-threatening event is required for a diagnosis
14 of post-traumatic stress disorder?

15 A. I think it could be included; I don't know if
16 it's necessary to complete it.

17 Q. Would you agree with me, sir, that you are not
18 a licensed psychiatrist?

19 A. Yes, I do.

20 Q. And would you agree with me, sir, that you're
21 not a licensed psychologist?

22 A. Yes, I do.

23 Q. And would you agree with me, sir, that your
24 work experience does not have any specialized training
25 for psychiatric or psychological care of patients?

1 A. No, I would not agree with that.

2 Q. And why would you disagree with that
3 statement?

4 A. Because in order to obtain board
5 certification, I have had to do many months of
6 psychiatric training, and family physicians are allowed
7 to handle simple affective disorders and anxiety
8 disorders with medications up to a certain period of
9 months before seeking psychiatric or psychological
10 consultation.

11 Q. Fair to say, sir, that the practice of
12 psychiatry is not part of your practice?

13 A. I don't know how to answer that question.

14 Q. Is it fair to say, sir, that you do not
15 describe your practice as a psychiatric practice?

16 A. That is correct.

17 Q. And is it fair to say, sir, that you would
18 rely on the expertise of psychiatrists or psychologists
19 in providing diagnoses for patients with psychiatric or
20 psychological illnesses?

21 A. On occasion.

22 Q. Fair to state it, the reason for your referral
23 of an individual to a psychiatrist or psychologist is
24 because you believe that -- that a psychiatrist or
25 psychologist may have better expertise to assist a

1 patient and to formulate a diagnosis?

2 A. That is fair.

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CERTIFICATE OF OATH

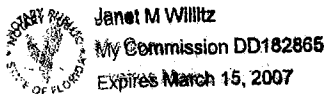
STATE OF FLORIDA)

)SS:

COUNTY OF PALM BEACH)

I, JANET M. WILLITZ, RPR, RMR, Notary Public
in and for the State of Florida at Large, certify that
the witness, BARRY BLUMENTHAL, DO, personally appeared
before me on July 26, 2006, and was duly sworn.

WITNESS my hand and official seal this 4th day
of August, 2006.



Janet M. Willitz
JANET M. WILLITZ, RPR, RMR
Notary Public, State of Florida

1 REPORTER'S VIDEOTAPED DEPOSITION CERTIFICATE

2 STATE OF FLORIDA)

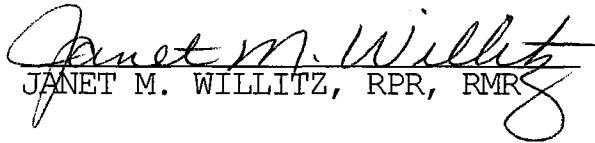
3)SS:

4 COUNTY OF PALM BEACH)

5
6 I, JANET M. WILLITZ, Registered Professional
7 Reporter, Registered Merit Reporter, certify that I was
8 authorized to and did stenographically report the
9 videotaped deposition of BARRY BLUMENTHAL, DO, the
10 witness herein; that a review of the transcript was not
requested; that the foregoing pages, number from page 1
to 40 are a true and complete record of my stenographic
notes of the deposition by said witness; and that this
computer-assisted transcript was prepared by me and/or
under my supervision.

11 I further certify that I am not a relative,
12 employee, attorney or counsel of any of the parties, nor
13 am I a relative or employee of any of the parties'
attorney or counsel connected with the action.

14 DATED this 4th day of August, 2006.

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16 JANET M. WILLITZ, RPR, RMR

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No.: 05-11652-WGY

JOHN D. CERQUEIRA,

Plaintiff,

vs.

AMERICAN AIRLINES, INC.

Defendant.

VIDEOTAPED DEPOSITION OF RICHARD FAULK, MD
A WITNESS
TAKEN BY
THE PLAINTIFF

DATE: WEDNESDAY, JULY 26, 2006

TIME: 1:18 P.M. - 2:41 P.M.

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1 Exhibit 1, and identify it for the jury?

2 A. Yes, this is my curriculum vitae.

3 Q. Is Exhibit Number 1 an up to date and accurate
4 version of your CV?

5 A. Yes, it is.

6 MS. MARIANI: Please note for the record our
7 objection on the evidentiary basis to the
8 admissibility of Exhibit 1.

9 BY MR. GODKIN:

10 Q. Dr. Faulk, have you ever treated patients with
11 post-traumatic stress disorder?

12 A. Yes, I have.

13 Q. Have you ever treated patients with anxiety
14 disorder?

15 A. Yes.

16 Q. About how many patients have you treated for
17 post-traumatic stress disorder?

18 A. I wouldn't be able to estimate that. I don't
19 keep exact records of the types of disorders to know how
20 many of each type of patient problem I've seen, so ---

21 Q. What is a post-traumatic stress disorder?

22 A. Well, post-traumatic stress disorder is an
23 anxiety disorder that has a number of different
24 features, the primary of which though is experiencing a
25 significant trauma, which is one that is potentially

1 life-threatening or of -- of the nature that it would
2 involve serious bodily harm.

3 Q. Is a post-traumatic stress disorder a subset
4 of anxiety disorder?

5 A. In general, yes, it would be considered a
6 subset of anxiety disorders. It's a type of -- of
7 traumatically induced anxiety disorder.

8 Q. And how would you define anxiety disorder?

9 A. Well, anxiety disorder is a broader category
10 that -- that includes a variety of different types of
11 symptoms or different -- different forms that have some
12 distinctions.

13 It's difficult in some patients though to --
14 to provide a diagnosis of one specific anxiety disorder,
15 so many patients will have a more general syndrome that
16 includes sometimes symptoms from several anxiety
17 disorders, but having a nature, a common symptom cluster
18 of fears, feelings of angst, sometimes leading to
19 heightened -- a heightened level of awareness, in the
20 sense that one could be overstimulated when they're
21 anxious.

22 MS. MARIANI: Move to strike.

23 BY MR. GODKIN:

24 Q. Is there a recognized treatment for anxiety
25 disorder?

1 MS. MARIANI: Objection.

2 THE WITNESS: Well, the treatment varies
3 depending on -- on the patient's individual needs,
4 but yes, there are different treatments that are
5 recognized for treating anxiety disorders.

6 BY MR. GODKIN:

7 Q. And what are those --

8 MS. MARIANI: Objection.

9 BY MR. GODKIN:

10 Q. -- treatments?

11 A. The treatments for anxiety disorder include
12 psychotherapy, which was a type of counseling that one
13 meets with a therapist on a one on one basis to -- And
14 review the symptoms, to work on strategies to reduce
15 them, and then secondly, another type of treatment is
16 medication. Those are the two most commonly used
17 treatments for anxiety.

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10 Q. Did -- Strike that. To -- to the best of your
11 knowledge and experience, Dr. Faulk, does the anxiety
12 disorder sometimes come with physical symptomatology?

13 MS. MARIANI: Objection.

14 THE WITNESS: Yes, sometimes it does.

15 BY MR. GODKIN:

16 Q. What kinds of physical symptoms can be
17 suffered by patients with an anxiety disorder?

18 A. Well, it -- It can be a variety of physical
19 symptoms, and there's -- There's really quite a spectrum
20 of physical symptoms that people can have from stomach
21 problems to tiredness to sleep pattern changes, to
22 changes in weight and appetite, to symptoms such as
23 shortness of breath or palpitations. I mean, there are
24 many different symptoms that -- that can be caused by
25 anxiety.

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Q. Based upon your experience, was it unusual that Mr. Cerqueira had waited a little over a year before seeking psychiatric care?

MS. MARIANI: Objection.

THE WITNESS: Unfortunately, it's -- It's not unusual. Many patients suffer from anxiety or other emotional symptoms for long periods of time, sometimes more than a year or several years before

CERTIFICATE OF OATH

STATE OF FLORIDA)

)SS:

COUNTY OF PALM BEACH)

I, JANET M. WILLITZ, RPR, RMR, Notary Public
in and for the State of Florida at Large, certify that
the witness, RICHARD FAULK, MD, personally appeared
before me on July 26, 2006 and was duly sworn.

WITNESS my hand and official seal this 4th day
of August, 2006.



Janet M Willitz
My Commission DD182865
Expires March 15, 2007

Janet M. Willitz
JANET M. WILLITZ, RPR, RMR
Notary Public, State of Florida

1 REPORTER'S VIDEOTAPED DEPOSITION CERTIFICATE

2 STATE OF FLORIDA)

3) SS:

4 COUNTY OF PALM BEACH)

5
6 I, JANET M. WILLITZ, Registered Professional
7 Reporter, Registered Merit Reporter, certify that I was
8 authorized to and did stenographically report the
9 videotaped deposition of RICHARD FAULK, MD, the witness
10 herein; that a review of the transcript was not
11 requested; that the foregoing pages, number from page 1
12 to 67 are a true and complete record of my stenographic
13 notes of the deposition by said witness; and that this
14 computer-assisted transcript was prepared by me and/or
15 under my supervision.

16 I further certify that I am not a relative,
17 employee, attorney or counsel of any of the parties, nor
18 am I a relative or employee of any of the parties'
19 attorney or counsel connected with the action.

20
21 DATED this 4th day of August, 2006.

22
23 
24 JANET M. WILLITZ, RPR, RMR
25